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No. 82-827

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MINNESOTA, PETITIONER

v.

MARSHALL DONALD MURPHY

ON WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether the Fifth Amendment prohibits the use in a criminal prosecution of incriminating statements made by the defendant to his probation officer during the course of non-custodial questioning, because the probation officer did not first warn the defendant of his right not to incriminate himself.

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INTEREST OF THE UNITED STATES

The issue in this case is whether statements made by a probationer to his probation officer during non-custodial questioning may be used in a criminal prosecution of the probationer, when the officer did not warn the probationer of his privilege against self-incrimination before questioning him. The resolution of the question whether such a warning is required will significantly affect the relationship between federal probation officers and the probationers and parolees they supervise. The Court's analysis of the issues presented by this case may also affect the ability of federal law enforcement officers to question suspects in many other contexts.

STATEMENT

1. In 1980, respondent was charged with criminal sexual conduct and pled guilty to the lesser included offense of false imprisonment. He was sentenced to 15 months' imprisonment, but the execution of that sentence was suspended and he was placed on probation for three years. Pet. App. A2, B2-B3.

The terms of respondent's probation required him, among other things, to report to his probation officer "as directed"; to attend a treatment program for sex offenders; to obey the law; and to "[b]e truthful to your Probation Officer in all matters." Pet. App. C32; see *id.* at A2, B3. Except for the provision concerning the treatment program, all of these are standard conditions of probation. *Id.* at B3, C4. A probationer who violates any condition may have his probation revoked and his sentence executed. *Id.* at C32.

In October 1980, respondent began a series of regular monthly meetings with probation officer Widseth. These meetings were held in Widseth's office. Pet. App. A2, C4-C5. The understanding between Widseth and respondent was that respondent would call her each month to schedule an appointment, and respondent did so, "on his own initiative" (*id.* at C13). Widseth described these meetings as follows: "We would discuss any changes that had occurred in his situation, his life situation, since I had last met with him, [and] his progress [in the treatment program] * * *. He discussed his employment quite often, many problems that arose with that, or with personal relationships." *Id.* at C6. At the same time, respondent was attending the treatment program at an institution called Alpha House. *Id.* at C4-C5.

In July 1981, Alpha House informed Widseth that respondent had stopped participating in the program. Widseth then wrote to respondent, saying: "In view of your recent Alpha House attendance difficulties, I am requesting that you contact me immediately. Failure to do so will result in an immediate request for a warrant." Pet. App. A2, B3, C7, C35. This was the first occasion on which Widseth had written a letter asking respondent to contact her. *Id.* at C14.

Respondent scheduled a meeting for one week later, and he and Widseth discussed his failure to participate in the program. After hearing respondent's explanation, Widseth decided that because respondent was doing well in other respects, she would not require him to continue

attending the treatment program. Pet. App. B3, C8, C14. Widseth had the authority, however, to require respondent to resume treatment. *Id.* at B3.

Respondent's next regular appointment with Widseth, on September 11, was again scheduled at respondent's instance. Pet. App. B4, C14. After this meeting, respondent "was under no obligation to arrange another meeting with his probation officer until mid-October" (*id.* at B4). But on September 22, an Alpha House counselor told Widseth that during the treatment program respondent said that he had once committed a rape-murder for which he was not charged. Without contacting the police, Widseth wrote to respondent: "To further discuss a treatment plan for the remainder of your probation, I am requesting that you contact me upon your receipt of this letter to set an appointment." *Id.* at A3, B4, C20, C36.

Respondent contacted Widseth and met her in her office on September 28. At that meeting, Widseth told respondent what she had learned from Alpha House and said that she now thought respondent would need further treatment. Pet. App. A3, B4. Widseth testified, and respondent confirmed her account, that she "expressed concerns to [respondent] that with the new information that I had received that his actions in the false imprisonment case and actions in the rape and murder that he had admitted to were strongly related behaviorally and that that needed to be dealt with [by] continued treatment." *Id.* at C9; see *id.* at C27.

Respondent reacted to Widseth's revelation of what she had learned from Alpha House by becoming "angry because he thought that everything he said in treatment was confidential." Pet. App. B5. Respondent "stated that he felt his confidences had been breached by the disclosure and that he felt like calling an attorney." *Id.* at A3. Widseth replied that respondent "would have to deal with" calling an attorney "outside of the office" (*id.* at C16) because her concern was the relationship between

the two offenses and respondent's need for further treatment. *Id.* at A3-A4, C16-C17.

Respondent's reaction to Widseth's emphasis on the relationship between the two offenses was to deny that he was guilty of the false imprisonment. Widseth confronted respondent with the evidence of his guilt of that offense. At some point, respondent began to discuss the rape-murder, explaining that it was unrelated to the false imprisonment because it was caused by a habit of using drugs that he had since broken. In the course of explaining the rape-murder, respondent described it in detail. Pet. App. A4, B5, C10-C11, C17-C18. Widseth testified that although respondent was calm during most of the conversation, he began crying toward the end and said that "he felt he had committed the ultimate sin" (*id.* at C11). Widseth also testified that the door to her office was open throughout the conversation and that respondent had been free to leave; respondent testified that he believed that if he had left the office he would have violated the conditions of his probation. *Id.* at C19-C20, C26.

At the end of the conversation, Widseth told respondent that she was obligated to report what she had learned to the police. Pet. App. B5. Respondent replied that he understood that this was her obligation and "that he thought [Widseth] must really care about him to have him come in and talk about this because [she] could have just picked up the phone and started dialing the police" (*id.* at C19, C21). But respondent also remarked that the only evidence against him "would just be [Widseth's] word" unless he confessed to the police (*id.* at C22). Widseth allowed respondent to leave her office, although she encouraged him to turn himself in to the authorities. A warrant was issued for his arrest several days later. *Id.* at A4-A5, C18-C19.

2. Respondent was indicted for first degree murder, and he moved to suppress the statements he had made to Widseth. After a hearing the trial court denied the motion. Pet. App. B2, B15, B17. It first ruled that because "the setting of the interview was not custodial" (*id.* at

B6), the fact that no *Miranda* warnings were given did not require the suppression of respondent's statements. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In reaching this conclusion, the trial court relied on *Oregon* v. *Mathiason*, 429 U.S. 492 (1977), and noted that while respondent was required to meet with Widseth periodically, "[h]e * * * was responsible for setting up the time" and "[t]he office was a place where he had been at least twelve times during the previous year." Pet. App. B11. Moreover, the court noted, respondent "came in on his own [and] he left on his own." *Ibid.*

The trial court also held that respondent's statements were voluntary. In this connection, the court found that respondent's reference to calling an attorney related only to his concern about Alpha House's supposed breach of confidentiality; the court specifically found that respondent "did not express th[e] desire [for an attorney] in any context other than a civil suit for the breach of confidentiality." Pet. App. B13-B14. The court also noted several factors suggesting that respondent's statements were voluntary. Widseth was familiar to him, as was the setting; he had chosen the time for the appointment; he was "29 years old, a high school graduate, * * * [with no] mental deficiencies"; and he "had been previously convicted of other felonies and was familiar with the criminal justice system." *Id.* at B13. Moreover, when Widseth opened the interview by relating to respondent the information she had learned from Alpha House, respondent "was angry" but only "at his confidences being disclosed," and he "talked with [Widseth] freely." *Ibid.*[1]

3. A divided Minnesota Supreme Court reversed, finding that although the questioning of respondent was not custodial interrogation, the conditions of his probation generated sufficient legal and psychological pressure to respond to Widseth's questions that in the absence of ap-

[1] The district court also held that the testimony of Alpha House counselors was inadmissible under both the regulations governing federally assisted treatment programs and, "it appears[,]" state law. Pet. App. B15-B16. This issue is not before this Court.

propriate warnings, respondent's statements should be considered to have been compelled.

SUMMARY OF ARGUMENT

A. The Self-Incrimination Clause, on which the decision below rests, applies only to *compelled* statements. The court apparently believed that respondent's statements were compelled by "psychological pressure" (Pet. App. A8), but the Fifth Amendment does not preclude the use of every statement resulting from some degree of psychological pressure. The Minnesota Supreme Court did not hold, and could not have held, that respondent was compelled to make incriminating statements to Widseth in the traditional sense that his will was overborne. Moreover, it correctly recognized that because respondent was not in custody, the prophylactic rule of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), did not apply to his statements.

Instead, the court apparently concluded that three circumstances combined to compel respondent to speak: his probation conditions placed him under some obligation to meet Widseth; they required him to be truthful with Widseth; and Widseth was questioning him about suspected criminal activity. But these circumstances, separately or together, do not create a compulsion to speak.

The obligation to meet periodically with a probation officer is in no way comparable to the kind of custodial pressures that can (as the Court held in *Miranda*) compel a person to speak. Unlike a person who is arrested, respondent was not placed under sudden physical restraint at a time and place chosen by an officer; he responded to a letter by making an appointment at his convenience. Moreover, respondent was not "thrust into an unfamiliar atmosphere * * * created to subjugate the individual to the will of his examiner" (*Miranda*, 384 U.S. at 457); he had met with Widseth in her office a dozen times. Respondent also was never under physical restraint. The most he asserted is that he be-

lieved he would violate his probation conditions if he left Widseth's office, and it is far from clear that even this belief was well founded, especially when respondent did not even ask Widseth if he could leave.

The probation condition requiring respondent to be truthful with Widseth did not on its face require him to answer any questions. Presumably respondent was under a general duty to cooperate with Widseth so that she could effectively supervise his probation, but such a general duty would not compel him to answer any particular question or line of questions, at least until Widseth informed him that he was being uncooperative in a way that violated the conditions of his probation. Moreover, respondent was free to seek clarification if he was in doubt about the extent to which his probation conditions required him to respond to Widseth's questions, but he did not do so. Had respondent refused to speak to Widseth about the rape-murder and subsequently been subject to probation revocation for such a refusal, there might be a colorable basis to his self-incrimination claim, but there is none in this context.

Even if respondent's probation conditions are understood to require him to answer each of Widseth's questions, respondent still had the opportunity to invoke the privilege against self-incrimination. This Court has repeatedly held that a person to whom questions are posed by the authorities ordinarily must invoke the privilege, instead of answering, or his answers will not be considered to have been compelled. Respondent could at least have attempted to assert the privilege to Widseth without any risk whatever.

This Court's decisions plainly preclude the Minnesota Supreme Court's suggestion that Widseth placed respondent under compulsion by revealing, with her questions, that she suspected him of a crime. *E.g.*, *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *Beckwith* v. *United States*, 425 U.S. 341 (1976). Nor is it significant that respondent may have had a relationship of trust and con-

fidence with Widseth. Respondent's statements unquestionably would not have been compelled if they had been made to an informer in whom he had absolute trust, and who he believed had no connection with the authorities; by contrast, respondent knew that Widseth was a law enforcement officer, and he had no reason to assume that she would not disclose to the police any information he gave her.

B. Even if it were concluded that the three circumstances identified by the Minnesota Supreme Court constituted the kind of pressure that would render statements compelled in other contexts, the special circumstances of the probation context dictate a different result. When a person has been convicted of a crime, his constitutional rights can be limited to the extent reasonably necessary to accommodate the government's penal and rehabilitative interests. The three circumstances that were held to create a compulsion to speak are indispensable to a workable probation system.

Probation cannot operate effectively unless the probationer can be required to report to his supervising officer and cooperate to the degree necessary to permit adequate supervision.. Moreover, the probation officer must be free to inquire into whether the probationer has committed another crime. Frequently, for example, the probation officer will receive information suggesting that the probationer has committed, or is planning, another crime during the probation period; the officer would be derelict in his duty if he did not investigate further to determine whether the probation had failed.

Requiring probation officers to give a warning before asking about possible criminal activity would significantly interfere with the probation relationship. It would go far beyond dispelling any coercion; it would put probationers on their guard, make those inclined to cooperate with their probation officers less willing to do so, and disrupt a relationship that is central to the rehabilitative process.

ARGUMENT

THE SELF-INCRIMINATION CLAUSE DOES NOT PROHIBIT THE STATE FROM USING RESPONDENT'S STATEMENTS AGAINST HIM IN A CRIMINAL PROSECUTION

A. Respondent Was Not Compelled to Answer His Probation Officer's Questions

1. Preliminarily, we note that the Minnesota Supreme Court cast its ruling in part in terms of due process (Pet. App. A10). It seems clear, however, that the court's reference to due process adds nothing to its ruling under the Self-Incrimination Clause. See *United States* v. *Washington*, 431 U.S. 181, 190 n.6 (1977). The conclusion to the majority's opinion (Pet. App. A11) makes it entirely clear that the court did not find Widseth's actions to be fundamentally unfair or shocking to its conscience.[2] Rather, the court observed that its invocation of due process was merely a way of "[s]tat[ing] differently" its conclusion that the prohibition against compelled self-incrimination barred the use of respondent's statements (*id.* at A10). The court did not suggest that the warning it required would serve any purpose other than to prevent a person from unwittingly incriminating himself, and the Due Process Clause provides no greater pro-

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[2] In particular, the court's opinion does not suggest that Widseth unfairly tricked respondent into believing that she would not report his statements to the police. Respondent testified (although neither court below found) that he did not expect Widseth to report his statements to the police (Pet. App. C27-C28, C30), but he did not testify that she made any representation, implicit or explicit, to this effect, and neither court below suggested that respondent had any basis for believing that his conversations with Widseth were confidential. See also *Fare* v. *Michael C.*, 442 U.S. 707, 722 (1979).

In any event, if the Minnesota Supreme Court was concerned that respondent mistakenly believed his conversations with Widseth were confidential, the proper course would have been to require a disclaimer of confidentiality, not a warning of the privilege against self-incrimination.

tection against compelled self-accusation than the Self-Incrimination Clause. See *Michigan* v. *Tucker*, 417 U.S. 433, 442 (1974); *Miranda* v. *Arizona*, 384 U.S. 436, 511-512 & n.8 (1966) (Harlan, J., dissenting).

2. The Self-Incrimination Clause prohibits the use of *compelled* statements. "The Amendment speaks of compulsion. It does not preclude a witness from [making statements] voluntarily in matters which may incriminate him." *United States* v. *Monia*, 317 U.S. 424, 427 (1943). "Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *Washington*, 431 U.S. at 187. See also *Miranda*, 384 U.S. at 478. The Minnesota Supreme Court appears to have concluded that "psychological pressure" (Pet. App. A8) compelled respondent to speak, but "pressure" and "compulsion" cannot be automatically equated in constitutional analysis.

a. The Fifth Amendment's prohibition of compelled self-incrimination cannot, of course, be read to extend to all official actions that cause a person to feel under some pressure to speak.[3] "The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions." *Washington*, 431 U.S. at 187. The mere fact that a question was asked by a law enforcement officer will cause most people to feel some degree of what might be characterized as psychological pressure to give an answer. See *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977); *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973). But it is entirely clear that the police may generally engage in non-custodial questioning of suspects without giving warnings, and that the answers they obtain are admissible. See *Washington*, 431 U.S. at 187-188 (law enforce-

[3] Although it is not entirely clear from the testimony given at the suppression hearing (see Pet. App. C8-C11, C17-C18, C26-C27) that respondent's incriminating statements were the result of Widseth's interrogation (see generally *Rhode Island* v. *Innis*, 446 U.S. 291 (1980)), both courts below assumed that they were, and we do also.

ment officials do not compel a statement if they create "an atmosphere conducive to truthtelling" in which a person "is more likely to tell the truth"); *Mathiason*, 429 U.S. at 495 ("Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question."); *Beckwith* v. *United States*, 425 U.S. 341 (1976); *Miranda*, 384 U.S. at 477-478.

Moreover, a variety of emotional or psychological needs may impel a person to admit that he has done wrong or to discuss acts that he believes to have been wrong. This is a common reason for making incriminating statements; a confession that is not the product of a calm calculation of self-interest is likely to be the result of such emotional or psychological impulses.[4] While difficult issues might arise if a law enforcement officer preyed on a suspect's particular psychological weakness, a statement is not compelled merely because an official's show of authority, together with his questions, triggered the emotional impulse to speak; otherwise, the products of obviously non-coercive police questioning would be excluded from evidence. Similarly, if a suspect is subconsciously seeking a sympathetic audience, there is no meaningful sense in which an official "compels" him to speak by merely asking questions in an unintimi-

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[4] When a suspect makes incriminating statements because he has calculated that he will receive more favorable treatment from the authorities if he cooperates than if he falsely maintains his innocence, his statements may be said to result from "psychological pressure" of an even more direct sort—the belief that he will be worse off if he does not cooperate. Nonetheless, a statement made for this reason is plainly not inadmissible under the Self-Incrimination Clause. See *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975). Moreover, the authorities may point out to a suspect that he is likely to be treated more favorably if he cooperates, as long as they do not make direct threats or coerce the suspect. See *Fare* v. *Michael C.*, 442 U.S. 707, 727 (1979).

dating way and assuring the suspect—perhaps truthfully—that he has some understanding of the suspect's plight and that the suspect may obtain some emotional satisfaction by speaking freely.[5] In such a situation, it is still "an independent decision on his part [that] cause[s] the defendant to speak" (*Miranda*, 384 U.S. at 465).

b. The test for determining if a statement has been compelled is thus not whether it is in some sense the product of psychological pressure, but "whether, considering the totality of the circumstances, the free will of the [speaker] was overborne." *Washington*, 431 U.S. at 188, citing *Rogers* v. *Richmond*, 365 U.S. 534, 544 (1961). But the Minnesota Supreme Court did not suggest that respondent's statements were compelled in this sense; respondent's interview with Widseth was not remotely comparable to the prolonged, coercive interrogations of vulnerable suspects that this Court has found to create a compulsion to speak.[6]

In *Miranda*, the Court held that statements that were not compelled in this sense would nonetheless be inadmissible if they were obtained by "custodial interroga-

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[5] Cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 487-488 (1971) ("[T]he simple but often powerful convention of openness and honesty [and] the fear that secretive behavior will intensify suspicion" are among the "forces pushing [a person] to cooperate with the police.").

[6] See, *e.g.*, *Mincey* v. *Arizona*, 437 U.S. 385, 401 (1978) ("The statements at issue were * * * the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness."); *Sims* v. *Georgia*, 389 U.S. 404, 407 (1967) (suspect "had been in the continuous custody of the police for over eight hours and had not been fed at all during that time. * * * He is an illiterate, with only a third grade education, whose mental capacity is decidedly limited"); *Lynumn* v. *Illinois*, 372 U.S. 528, 534 (1963) (suspect "was encircled in her apartment by three police officers and a twice convicted felon," and "the police * * * told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate' ").

tion" of a defendant who had not been warned of his right to remain silent and his right to have an attorney present. 384 U.S. at 444. The Court reasoned that a custodial setting "carries its own badge of intimidation" (*id.* at 457) because "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to [manipulative and intimidating] techniques of persuasion * * * cannot be otherwise than under compulsion to speak" (*id.* at 461). The Court accordingly determined that "without proper safeguards the process of in-custody interrogation * * * contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely" (*id.* at 467).

But the Minnesota Supreme Court did not hold, and could not have held, that *Miranda* itself required the suppression of respondent's statements to Widseth. *Miranda* applies only to "a defendant questioned while in custody or otherwise deprived of his freedom of action in a[] significant way." 384 U.S. at 445. *Miranda* warnings are needed "to dispel the compulsion inherent in *custodial* surroundings" (*id.* at 458; emphasis added). The trial court ruled that "the setting of the interview" between respondent and Widseth "was not custodial" (Pet. App. B6), and the Minnesota Supreme Court agreed that respondent "was not in custody in the usual sense" (*id.* at A9).

In *Oregon* v. *Mathiason*, this Court held that a parolee under supervision, who reported to a police station in response to a police officer's request and was told that he was not under arrest, was not in custody within the meaning of *Miranda*. See 429 U.S. at 495 ("*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited."). Respondent's situation was not materially different from that of the parolee in *Ma-*

thiason; respondent came by himself in response to a request from Widseth, and he clearly was not placed under arrest at any point. Indeed, the conversation between Widseth and respondent—Widseth's urging respondent to turn himself in, and respondent's thanking Widseth for not notifying the police at once—demonstrates that it was well understood that respondent was not under arrest.

3. Even though respondent's will was not overborne and he was not placed in a custodial setting that required *Miranda* warnings, the Minnesota Supreme Court determined that the psychological pressures to which respondent was exposed constituted sufficient compulsion to render respondent's statements inadmissible. The court apparently believed that three circumstances created this compulsion (see Pet. App. A10): respondent's probation conditions placed him under some obligation to meet with his probation officer; respondent's probation was conditioned on his being truthful with the probation officer; and the officer was questioning him about possible criminal activity.[7]

While there were, of course, certain compulsory aspects of respondent's relationship with Widseth, the Minnesota Supreme Court failed to explain why these features created an unacceptable "compulsion to *speak*" (*Miranda*, 384 U.S. at 461; emphasis added). None of the decisions it cited supports its holding,[8] which is

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[7] Apparently, Widseth asked respondent about the rape-murder because of information, learned from Alpha House, that the trial court held inadmissible. But nothing in the opinion of the Minnesota Supreme Court suggests that its holding was influenced by this circumstance. Consequently, for present purposes, this case must be viewed as if Widseth asked respondent about the rape-murder because she had acquired admissible information from a source to which she was entitled to access, or from her own investigations.

[8] The court principally relied (see Pet. App. A8) on *United States v. Steele*, 419 F. Supp. 1385 (W.D. Pa. 1976). Although *Steele* suppressed a statement made to a probation officer who had not warned the probationer, it squarely held, as a necessary premise of its decision, that "[t]here is no question * * * that defendant was in

flatly inconsistent with the decisions of several federal courts.[9] We submit that there is no basis for concluding that the three circumstances mentioned by the court gave rise to compulsion within the meaning of the Self-Incrimination Clause.

a. In concluding that "the compulsory nature of the meeting" between respondent and Widseth contributed to the compulsion to speak, the Minnesota Supreme Court,

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cus'ody at the time he was questioned by the probation officer." *Id.* at 1386. Indeed, the court appears to have ruled, in dictum, that "a probationer is not entitled to Miranda warnings when questioned on a visit to his probation officer." *Ibid.* See also *United States* v. *Deaton*, 468 F.2d 541, 544 (5th Cir. 1972) (parolee "was in custody" when interrogated); *People* v. *Diesing*, 67 Ill. App. 3d 109, 384 N.E.2d 575 (1978) (probationer was confined in county jail when interrogated); *State ex rel. Struzik* v. *Department of Health & Social Services*, 77 Wis. 2d 216, 252 N.W.2d 660 (1977) (parolee was confined in jail); *People* v. *Hardenbrook*, 68 Mich. App. 640, 243 N.W.2d 705 (1976) (holding *Miranda* inapplicable to probation revocation proceedings; not addressing question whether *Miranda* warnings would be required if state sought to use evidence in a criminal prosecution); *State* v. *Magby*, 113 Ariz. 345, 348-349, 554 P.2d 1272, 1275-1276 (1976) ("in-custody statements * * * to a probation officer"); *State* v. *Roberts*, 14 Wash. App. 727, 544 P.2d 754 (1976) (statements made by probationer who was not in custody are admissible even though not preceded by *Miranda* warnings); *State* v. *Gallagher*, 38 Ohio St. 2d 291, 313 N.E.2d 396 (1974), remanded, 425 U.S. 257, on remand, 46 Ohio St. 2d 225, 348 N.E.2d 336 (1976) (*Miranda* warnings required under state law when parolee is questioned in jail); *State* v. *Williams*, 486 S.W.2d 468, 473-474 (Mo. 1972) (*Miranda* warnings must be given if a parolee "has been arrested and taken into actual police custody"); *State* v. *Lekas*, 201 Kan. 579, 583, 442 P.2d 11, 15 (1968) (parolee "was taken into custody").

[9] See, *e.g.*, *United States* v. *Holmes*, 594 F.2d 1167, 1171 (8th Cir.), cert. denied, 444 U.S. 873 (1979) (contention that probationer is entitled to *Miranda* warnings before non-custodial interview with probation officer is "insubstantial"); *United States* v. *Delago*, 397 F. Supp. 708, 712 (S.D.N.Y. 1974). See also *United States* v. *Rea*, 678 F.2d 382, 390 (2d Cir. 1982); *United States* v. *Miller*, 643 F.2d 713, 715 (10th Cir. 1981) (*Miranda* warnings not required before interview with probation officer at probationer's home).

while acknowledging that respondent was not in custody within the meaning of *Miranda*, relied on *Miranda* by analogy. See Pet. App. A8-A10. *Miranda*, of course, did not hold that even custodial interrogation invariably compels a suspect to speak; *Miranda* only specified "prophylactic standards" designed "to safeguard [the] privilege" against self-incrimination in a custodial setting. *Michigan* v. *Tucker*, *supra*, 417 U.S. at 446. More important, however, this case presents none of the characteristics of custodial interrogation that the *Miranda* Court found inherently likely to create a compulsion to speak.

For example, the court below stated that respondent met with Widseth "under legal compulsion" because "it had been made clear to him in the past that it was a condition of his probation that he meet with the agent when requested." Pet. App. A10. But there is a great difference between the diffuse compulsion to meet regularly with a probation officer and the intense custodial presence that, *Miranda* found, was likely to intimidate a person into speaking when he would rather remain silent.

Respondent was not "swept from familiar surroundings into police custody" by a forcible arrest (*Miranda*, *supra*, 384 U.S. at 461); he made an appointment at a mutually convenient time, and there is no reason to doubt that Widseth would have permitted him to reschedule the appointment if he had a legitimate reason for doing so. By contrast, a suspect who is arrested is often physically forced to submit to an officer at the time and place chosen by the officer, without any opportunity for prior consultation with counsel or friends, and thereafter remains under the officer's control; for this reason, the *Miranda* Court was concerned that an arrest may convey to the suspect the message that he has no choice but to submit to the officer's will in other respects as well. See, *e.g.*, 384 U.S. at 456-457. Respondent was subjected to no such compulsion; while he presumably knew that he was expected to answer Widseth's letter,

the psychological impact of the letter on respondent obviously cannot be compared to the effect of an arrest in its tendency to cause an individual to believe that he has no choice but to submit to the officer.[10] Indeed, respondent was subject to less intimidating pressure than a person subpoenaed to testify, about whom this Court has explained (*United States* v. *Dionisio*, 410 U.S. 1, 10 (1973), quoting *United States* v. *Doe*, 457 F.2d 895, 898 (2d Cir. 1972)):

> The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative "stop" * * *:
>
> > "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court."

Moreover, the routine nature of respondent's meetings with Widseth sharply distinguishes them from the encounters that *Miranda* determined to be inherently coercive. Respondent was not "thrust into an unfamiliar atmosphere" or "an interrogation environment * * * created for no purpose other than to subjugate the individual to the will of his examiner" (*Miranda*, 384 U.S. at 457). As the district court noted, both the surroundings and Widseth herself were very familiar to respondent; he had met with her in her office a dozen times. An individual in a familiar environment, dealing with a

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[10] Moreover, the meeting at which respondent made his inculpatory statements was, if anything, even less obligatory than respondent's other meetings with Widseth. It was not a regularly scheduled monthly meeting of the sort that respondent knew he had to arrange; Widseth only "request[ed]" that respondent contact her and, in contrast to her previous letter, did not threaten respondent with arrest if he did not do so.

person he knows, is far less subject to psychological intimidation. The Court recognized this fact in *Miranda*, where it stressed the ability of police officers to take advantage of a suspect's unfamiliarity with both them and the environment. See, *e.g.*, 384 U.S. at 450, 457, 496. Many of the psychological ploys discussed in *Miranda* capitalize on this unfamiliarity and would simply have been unavailable to Widseth. See *id.* at 452.

Finally, the coercive pressures with which *Miranda* is concerned derive in large measure from "an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained" (384 U.S. at 468; see, *e.g.*, *id.* at 451). But respondent concededly was not under physical restraint or unable to leave Widseth's office. The most that respondent averred—in testimony at the suppression hearing—was that he thought he would be declared in violation of his probation if he left. See Pet. App. C26. A similar claim of "compulsion" could have been made if respondent and Widseth had been speaking on the telephone. The effect of such "compulsion" is not comparable to the intimidating pressure on a suspect who knows that he literally cannot escape an insistent interrogator.[11]

b. It was also error to conclude that respondent's statement was compelled by the probation condition that required him to be truthful with his probation officer. On its face, that probation condition simply required respondent not to make false statements to Widseth and said nothing about his freedom to decline to answer.

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[11] In any event, neither court below specifically found that respondent remained in Widseth's office because he believed he would be declared in violation of his probation if he left. It is far from certain that respondent had such a belief; as we noted, the meeting was scheduled at a time agreeable to respondent and was in response to a request unaccompanied by any threat, and Widseth had been far from inflexible in her prior dealings with respondent. Had respondent been in doubt about whether he could leave without violating a condition of his probation, he could have asked Widseth.

Citizens are often required to be truthful in their dealings with the government; any person commits a crime if, for example, he makes a false statement to a federal law enforcement officer in connection with a matter within the officer's jurisdiction. 18 U.S.C. 1001.

i. We will assume, however, that respondent, like most probationers, was required to cooperate with Widseth to the extent necessary to permit adequate supervision. That is, respondent presumably was not free to refuse to answer Widseth's questions altogether. But it does not follow that respondent was compelled to answer every particular question. It is not clear that his general duty to cooperate precluded him from declining on occasion to discuss certain matters—because he considered them too private, for example—as long as he did not unduly obstruct efforts to supervise his probation. Consequently, at least until Widseth gave respondent some reason to believe that he was being uncooperative in a way that violated the conditions of his probation, any requirement that he be generally cooperative could not have *compelled* him to discuss a particular subject.

In any event, if respondent was in doubt about the contours of his duty to cooperate with Widseth, or the meaning of the probation condition that required him to be truthful, he was free to seek clarification. Even though he knew from the time he accepted probation that he had incriminating secrets in which Widseth would be interested, we know of no indication that he ever asked her or the sentencing court for clarification of his duty, if any, to disclose such information.

To be sure, the existence of a general duty to cooperate may have affected respondent's attitude toward Widseth's questions, his overall willingness to be forthright with her, and the atmosphere of their encounters. But such influences are comparable to the "atmosphere conducive to truthtelling" (*Washington*, 431 U.S. at 187) that surrounds many official proceedings, or the "coercive aspects" of every interview with a police officer (*Mathiason*, 429 U.S. at 495). As we explained above, such influences do not constitute compulsion to speak.

ii. Even if respondent's probation conditions are construed as having required him to answer *all* of Widseth's questions, respondent still had the opportunity to assert the privilege against self-incrimination if he wished not to give an incriminating answer. The pressure involved would have been no greater than that on a witness subpoenaed to testify or a taxpayer under a legal obligation to file a federal income tax return. It is well established that if such a witness or taxpayer makes a statement, instead of claiming the privilege against self-incrimination, the statement may be used against him in a criminal prosecution. See, *e.g.*, *Garner* v. *United States*, 424 U.S. 64Ɛ (1976); *United States* v. *Kordel*, 397 U.S. 1 (1970); *Rogers* v. *United States*, 340 U.S. 367, 370-371 (1951); *Monia*, 317 U.S. at 427; *United States* v. *Murdock*, 284 U.S. 141, 148 (1931); *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 112-113 (1927). See also *Maness* v. *Meyers*, 419 U.S. 449, 466 (1975) (The privilege against self-incrimination "is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion.").[12]

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[12] The court below correctly noted (Pet. App. A5-A6) that the rule is not the same for *custodial* interrogations. As this Court has explained (see *Garner*, 424 U.S. at 657-658; *Roberts* v. *United States*, 445 U.S. 552, 560 n.6 (1980)), that is because the pressures *Miranda* determined to be inherent in custodial surroundings are pressures not just to answer questions but to refrain from asserting the privilege; pressures that tend to overbear a person's will not to answer also overbear his will to assert the privilege. "It is presumed that without proper safeguards the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent. * * * Thus, any pressures inherent in custodial interrogation are compulsions to incriminate, not merely compulsions to make unprivileged disclosures." *Garner*, 424 U.S. at 657.

But as we have explained, respondent was not in custody or in any condition comparable to custody when Widseth interviewed him, and the setting of that interview did not create pressures tending to overbear respondent's will. "Although *Miranda*'s requirement of specific warnings creates a limited exception to the rule

The reason for this principle is that a person who is required to answer a question may nevertheless choose to answer for reasons of his own and not because he is compelled within the meaning of the Fifth Amendment; unless he asserts the privilege, there is ordinarily no basis for concluding that he has not made such a voluntary choice.

> [I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not "compelled" him to incriminate himself. "[If a declarant] * * * desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."

Garner, 424 U.S. at 654-655, quoting *Monia*, 317 U.S. at 427 (footnote omitted).

Respondent could have attempted to assert the privilege —to Widseth, at least—without risk; nothing in respondent's testimony suggests that he believed or had reason to believe that his probation would have been revoked for merely asking Widseth if he could decline to answer her questions because he might incriminate himself. For this reason, respondent's situation was in no way comparable to that of the witnesses in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), who knew that they would suffer substantial penalties if they invoked the privilege. See also *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973). Had Widseth informed respondent that asserting the privilege would be a violation of the conditions of his probation, a more difficult question would arise whether respondent would have had to persist and test his right to assert the privilege in probation revocation proceedings. See *Garner*, 424 U.S. at 661-665. See also pages 29-30 note 18, *infra*. In the circumstances presented by this case, however, there

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that the privilege must be claimed, the exception does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Roberts*, 445 U.S. at 560.

is no reason to attribute respondent's willingness to discuss the rape-murder to compulsion arising from his probation conditions; the more plausible explanation is that respondent chose to discuss it for other reasons, and that any role played by pressures arising from his probation status did not amount to constitutionally proscribed compulsion.[13]

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[13] The trial court found that respondent's comment that he thought he should contact an attorney related only to what respondent considered to be Alpha House's breach of confidentiality, not to Widseth's questioning. The Minnesota Supreme Court did not question this finding, or suggest that respondent invoked the privilege against self-incrimination when he made this comment. Moreover, that court's holding in no way depended on a determination that respondent requested an attorney or otherwise invoked the privilege.

The Minnesota Supreme Court appears to have interperted certain statements in *Garner*, 424 U.S. at 657, 660, and *Roberts*, 445 U.S. at 559, to suggest that because Widseth "had substantial reason to believe that [respondent's] answers were likely to be incriminating" (Pet. App. A10; see *id.* at A6), respondent did not have to invoke the privilege in response to her questions but could answer and later seek to suppress the statements. This reasoning is flawed in several respects.

First, the Self-Incrimination Clause cannot under any circumstances require the suppression of respondent's statements unless those statements were compelled. Even those members of the Court who have suggested that a witness sometimes need not invoke the privilege in response to a question that clearly seeks incriminating information advocate such an approach only if an answer to the question is by some means compelled. See, *e.g.*, *United States* v. *Mandujano*, 425 U.S. 564, 591-594, 596-600 (1976) (Brennan, J., concurring). As we explained in the text, unless respondent's probation conditions are somewhat unnaturally interpreted to require him to answer each of Widseth's questions, he was not under compulsion from any source to speak about the rape-murder. See *Washington*, 431 U.S. at 190 ("[T]he distinction between compulsion to incriminate and compulsion to disclose what the Government is entitled to know is of no help to respondent; in this case there was no compulsion to do either.").

Even when a person is under compulsion to answer the government's questions, it should not be material that the government knows it is seeking incriminating information unless the person is silent, and the government seeks to penalize his silence. If a

Respondent also cannot contend that a warning was required to ensure that he was not ignorant of his right not to incriminate himself. This Court has never held that such a warning is needed before non-custodial questioning, even in cases where a defendant is far more likely than respondent to be unaware of his rights. See *Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 226-227 (citing cases). *Miranda* itself envisioned that police officers would question persons not in custody without giving warnings (384 U.S. at 447-448), and the *Miranda* Court could scarcely have assumed that all of those so interrogated would be more familiar with their constitutional rights than respondent. Even when a person is compelled to answer questions—as in the case of a witness under subpoena—the Court does "not apply a

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compulsory question does not obviously seek incriminating information (as in the case of a federal income tax return), silence may be either an invocation of the privilege or a simple evasion of the duty to answer, and the government is entitled to treat it as the latter unless it is clearly identified from the outset as the former. See *United States* v. *Sullivan*, 274 U.S. 259, 263-264 (1927). See also *Roberts*, *supra*. But when a question obviously seeks incriminating information, there is far more reason to treat silence as an invocation of the privilege and "therefore forg[i]ve the usual requirement that the claim of privilege be presented" (*Garner*, 424 U.S. at 659 n.11). The Court forgave the requirement for this reason in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), the gambling tax cases discussed in the portion of *Garner* on which the Minnesota Supreme Court relied.

Here, of course, the State did not seek to penalize respondent for silence, but to use statements he made. In this situation, as we explained in the text, the rationale for the rule that the privilege must be asserted when the statement is sought is that otherwise the statement cannot be considered compelled. This rationale is equally strong whether or not the government knows that the answer to its question will probably be incriminating. If, as the Court has said (*Garner*, 424 U.S. at 654-655, quoted at page 21, *supra*), a person's failure to invoke the privilege in response to a question means that the answer cannot be treated as compelled, it has this meaning no matter what the state of the government's knowledge.

'waiver' standard as that term was used in *Johnson* v. *Zerbst*, 304 U.S. 458[, 464] (1938) ["an intentional relinquishment * * * of a known right"], and * * * an individual may lose the benefit of the privilege without making a knowing and intelligent waiver." *Garner*, 424 U.S. at 654 n.9. The Court has, in short, always assumed that individuals have a sufficient familiarity with the principle that they are not obligated to incriminate themselves to the authorities (see *Michigan* v. *Tucker*, *supra*, 417 U.S. at 439 ("virtually every schoolboy is familiar with the concept, if not the language, of the [Self-Incrimination Clause]")), or that, in any event, their ignorance would not transform a non-coercive inquiry into compulsion.

Indeed, respondent has not asserted that he was unaware of his privilege against self-incrimination. His "angry" reaction upon learning that Alpha House had disclosed information to Widseth shows that he was well aware of the advantages of keeping incriminating information from her and felt himself under no obligation to reveal such information to her.[14] At the end of his interview with Widseth, respondent expressly contemplated refusing to confess to the police and calculated the effect of such a refusal on his prospects. See Pet. App. C22. In sum, although the trial court made no finding on this point, it seems reasonable to suppose that once respondent learned of the information Alpha House had given to Widseth, he thought considerable emotional release could be gained by discussing the matter more fully with her. In no sense does this constitute compulsion.[15]

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[14] In fact, respondent appears to have disclaimed ignorance, insisting at the suppression hearing that when Widseth mentioned the rape-murder "little flags went up in my head, and you know, I felt like I needed an attorney at the time." Pet. App. C26. (As we noted (page 22 note 13, *supra*), the district court apparently did not credit respondent's assertion that he requested an attorney for this reason, and the Minnesota Supreme Court did not question that determination.)

[15] The Minnesota Supreme Court placed some reliance (see Pet. App. A9) on *Estelle* v. *Smith*, 451 U.S. 454 (1981), which held that

c. The third circumstance on which the Minnesota Supreme Court relied in concluding that respondent's incriminating statements were the product of compulsion was that Widseth "had substantial reason to believe that [respondent's] answers were likely to be incriminating" (Pet. App. A10). But if the circumstances of respondent's interview with Widseth and the conditions of respondent's probation did not compel respondent to answer the other questions Widseth asked, he did not suddenly become compelled to answer when Widseth asked questions about the rape-murder. This Court's decisions foreclose any contention that an otherwise non-coercive interview becomes coercive solely because the authorities ask questions revealing their suspicions and some of the evidence against the suspect. See *Mathiason*, 429 U.S. at 495 ("Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.").

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a psychiatrist may not, at the sentencing phase of a capital trial, give testimony based on damaging statements the defendant made during a custodial, court-ordered psychiatric examination. But in ruling that *Miranda* warnings would be required before such an examination if its results were to be used against the defendant, the Court repeatedly emphasized the custodial nature of the examination. See 451 U.S. at 467, 468, 469. Although the Court suggested that a non-custodial examination could not be compelled if the results were to be used at the sentencing phase of a capital trial, there is no intimation in the Court's opinion that *warnings* would be required before a non-custodial examination that is otherwise not compulsory (see *id.* at 468).

In addition, there is some possibility that a defendant undergoing a psychiatric examination—especially if, as in *Estelle* v. *Smith*, it purports to be concerned only with his competence to stand trial (see 451 U.S. at 456-457)—will make statements that are apparently unrelated to any crime and that become damaging to the defendant only because the psychiatrist, after analyzing them, shows them to be evidence that the defendant is dangerous. For this reason, a defendant undergoing a psychiatric examination may not appreciate that his statements could possibly be incriminating, and their later use may implicate due process concerns distinct from the privilege against compelled self-incrimination. The same cannot be said about respondent, who of course knew that he was discussing a crime with Widseth.

In *Beckwith* v. *United States*, 425 U.S. 341 (1976), for example, the defendant urged—much as the Minnesota Supreme Court reasoned here—that he was entitled to warnings before an interview in which he was the "focus" of a criminal investigation, because that interview placed him "under 'psychological restraints' which are the functional, and, therefore, the legal, equivalent of custody" (*id.* at 345) with its attendant coercive influences. The Court emphatically rejected that contention, saying that it "goes far beyond the reasons for th[e] holding" in *Miranda* and "would cut this Court's holding in that case completely loose from its own explicitly stated rationale" (425 U.S. at 345). "It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the *Miranda* requirements with regard to custodial questioning." *Beckwith*, 425 U.S. at 346-347 (citations omitted).

The Minnesota Supreme Court might have been influenced by a belief that respondent's incriminating statements to Widseth were to some degree the product of a relationship of trust and cooperation. While this may be true, it does not follow that respondent's statements were compelled or that the values protected by the Self-Incrimination Clause were otherwise implicated. As we noted earlier, confessions will frequently be the result of emotional or psychological impulses, and a law enforcement officer does not compel a statement when he does no more than give those impulses a chance to operate. Indeed, a relationship of trust, in which respondent found Widseth a sympathetic audience, is more nearly the opposite of the overbearing practices condemned by the Court in *Miranda*. Moreover, a statement to an informant prompted by a mistaken belief that he has no relationship with the authorities and can be trusted not to go to them is, without question, not "compelled" within the meaning of the Fifth Amendment. *Hoffa* v. *United States*, 385 U.S. 293, 303-304 (1966).

Respondent was well aware that Widseth was a law enforcement officer; even the element of deception involved in an incriminating statement to an informant was, therefore, absent here. See also page 9 note 2, *supra*.

We recognize, of course, the dangers to the probation system that might arise if probationers come to regard their supervising officers as nothing more than investigatory law enforcement agents. But the government—which established the probation system as an alternative to prison and as a means of rehabilitating offenders—has a strong institutional interest in not jeopardizing relationships of trust and confidence between probation officers and probationers. We understand, for example, that supervising officers frequently do not seek to prosecute probationers who admit minor crimes to them.[16] Moreover, one consequence of the Minnesota Supreme Court's approach will be to encourage probation officers, acting out of an abundance of caution, to give unnecessary warnings lest they jeopardize a prosecution for a major offense that should not be overlooked. The giving of such warnings can seriously undermine the probation relationship, by discouraging probationers from viewing probation officers as counselors with whom they can discuss their problems, without any benefit to values protected by the Fifth Amendment.

B. Even if Respondent's Probation Conditions Amounted to the Kind of Pressure that Would Constitute Coercion in Other Circumstances, They do not Give Rise to Impermissible Compulsion Here Because They Are Integral Aspects of the Sentence of Probation that the State Lawfully Imposed

Ordinarily, the government would violate a defendant's Fifth Amendment rights if it obtained statements

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[16] Officials of the Administrative Office of the United States Courts, which supervises federal probation officers, have urged that "probation officers preferably not be called as witnesses to testify to statements made in confidence to them by probationers or parolees." Imlay & Reid, *Looking at the Law*, 40 Fed. Probation Q. 56, 58 (Dec. 1976).

from him by compulsion and used the statements in a criminal prosecution. The Fifth Amendment rights of an "already-convicted probationer" (*Gagnon* v. *Scarpelli*, 411 U.S. 778, 789 n.12 (1973)), however, may be limited in order to achieve the legitimate objectives of the probation system. Consequently, even if it were correct to conclude that respondent's statements were the product of what in other contexts would amount to impermissible compulsion, it would not follow that the use of those statements in this case would violate the Constitution.

1. The Court has repeatedly held that constitutional rights that would otherwise be retained by a person convicted of a crime may be restricted in order to accommodate the needs of the penal system. See, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 545-546 (1979); *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125 (1977); *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974); *Price* v. *Johnston*, 334 U.S. 266, 285 (1948). While this Court's cases have dealt with prisoners, the principle must apply equally when some other form of treatment, such as probation, is determined to be appropriate: "There must be a 'mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.'" *Bell* v. *Wolfish*, 441 U.S. at 546, quoting *Wolff* v. *McDonnell*, 418 U.S. 539, 556 (1974). The courts of appeals, applying this principle, have consistently upheld conditions, reasonably related to the purposes of probation, that dramatically limited the exercise of constitutional rights.[17]

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[17] See *e.g.*, *United States* v. *Grubb*, 636 F.2d 1211 (3d Cir. 1980), cert. denied, 451 U.S. 970 (1981) (prohibition on holding union office); *United States* v. *Tonry*, 605 F.2d 144, 150 (5th Cir. 1979) (prohibition on running for office or engaging in political activity); *United States* v. *Albanese*, 554 F.2d 543, 545-547 (2d Cir. 1977) (prohibition on associating with other than law-abiding citizens); *Malone* v. *United States*, 502 F.2d 554, 555 (9th Cir. 1974), cert. denied, 419 U.S. 1124 (1975) (prohibition on "participat[ing] in any American Irish Republican movement[,] * * * belong[ing] to

2. In this case, any reasonable accommodation would permit the State to retain the features of its probation system that the court below identified as a source of compulsion without having to forgo the use of the probationer's statements in a criminal prosecution. The resulting burden on the probationer's constitutional rights is, at most, slight. The compulsion perceived by the Minnesota Supreme Court is attenuated and diffuse; it derives solely from a non-custodial interview and an ambiguous probation condition. Moreover, as we noted, respondent could have resisted even these weak pressures simply by asserting his privilege against self-incrimination.[18]

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* * * Irish organizations, cultural or otherwise[,] * * * visit[ing] any Irish pubs * * * [and] accept[ing] * * * employment that directly or indirectly associates [probationer] with any Irish organization or movement"); *United States* v. *Smith*, 414 F.2d 630, 636 (5th Cir. 1969), rev'd on other grounds *sub nom. Schacht* v. *United States*, 398 U.S. 58 (1970) (prohibition on certain political associations).

[18] Unlike the situation in cases such as *Lefkowitz* v. *Turley*, *supra*, and *Garrity* v. *New Jersey*, *supra*, a substantial argument can be made that because of the importance of keeping a probation officer apprised of the probationer's activities, the government may revoke probation if the probationer asserts his privilege against self-incrimination. As Judge Frankel explained, allowing a probationer to assert the privilege against self-incrimination in response to his probation officer's legitimate inquiries

> would probably spell the end of probation. Defendants are left at large rather than locked up on the understanding that they will be subjected to supervision and will cooperate in their supervision. As an alternative to an intolerable regime of surveillance approaching the quality of prison, probationers must be, and are, relied upon to supply accounts of their major activities, including their means of earning a living. * * * It is unlikely that Congress would continue to authorize, or that sentencing judges would remain as ready to employ, the alternative of probation if the reporting requirement were held unconstitutional.
>
> * * * The requirement to report, to account, is centrally and necessary implied in the probationer's status. It may not be avoided by the claim of a privilege which must be held un-

At the same time, the Minnesota Supreme Court's approach might impose severe—perhaps intolerable—costs on the government's ability to maintain a probation system, at least for more than trivial offenses. The purpose of probation is to supervise offenders while " 'help[ing them] reintegrate into society as constructive individuals as soon as they are able' " (*Gagnon* v. *Scarpelli*, *supra*, 411 U.S. at 783, quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 477 (1972)), and the probation officer plays a central role in "supervis[ing the] course of rehabilitation" (*Gagnon*, 411 U.S. at 784). The three circumstances that the court below identified as a source of compulsion are indispensable to this process; legislatures and sentencing judges would surely be unwilling to permit probation in many instances where it is now allowed if probationers could not be required to meet with their probation officers and be truthful with them, and if probation officers could not question them about possible criminal activity.

The reporting requirement is plainly central to the probation relationship. "The duty 'to report' and to answer questions posed by a probation officer is an integral obligation of the probationary status." *United States* v. *Rea*, 678 F.2d 382, 390 (2d Cir. 1982). As this Court has noted, "through the requirement of reporting

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available because it is fundamentally inconsistent with the acquisition and maintenance of the probationary status.

United States v. *Manfredonia*, 341 F. Supp. 790, 794-795 (S.D.N.Y.), aff'd, 459 F.2d 1392 (2d Cir.), cert. denied, 409 U.S. 851 (1972). See also *United States* v. *Rea*, 678 F.2d 382, 390 (2d Cir. 1982) ("While a probationer is not deprived completely of his Fifth Amendment rights and may assert them, he runs the risk that his refusal to answer will lead to a charge of violation of probation. Any other rule would make a mockery of the supervision aspect of probation.").

But this case does not present the question whether the government may require a probationer to relinquish his privilege against self-incrimination entirely, because respondent never asserted the privilege, and the State never attempted to compel a statement over an assertion of the privilege. Cf. *Roberts*, *supra*.

to the parole officer * * * the officer is provided with information about the parolee and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development." *Morrissey*, 408 U.S. at 478 (footnote omitted).

Moreover, it is not unusual for a probation officer to receive information suggesting that a probationer was involved in another crime, or may be contemplating criminal activity. A probation officer would be derelict in discharging both aspects of his "'double duty to the welfare of his clients and to the safety of the general community'" (*Gagnon*, 411 U.S. at 783 (citation omitted)) if, upon receiving such information, he did not promptly ask the probationer about the matter and seek to resolve it. See also *Fare* v. *Michael C.*, 442 U.S. 707, 720-722 (1979). A crime committed during the course of probation is an indication that probation is not succeeding and that some corrective action is needed; the fact that the probationer committed an earlier crime may similarly suggest the need for some additional or modified treatment or punishment. Here, for example, Widseth sought to discuss the rape-murder with respondent because she was reconsidering her decision to excuse him from the treatment program.

Unless the government abandons one of these central aspects of probation, the Minnesota Supreme Court's approach would force it to choose between warning a probationer of his right not to incriminate himself and forgoing the use of his statements in a criminal prosecution. Either course would seriously interfere with the probation system. As this Court recognized in *Miranda* (see 384 U.S. at 468-469), both the purpose and the effect of a warning are to put the person being questioned on his guard. See also *Michigan* v. *Mosley*, 423 U.S. 96, 103-104 (1975). While a warning might dispel whatever coercive pressures are present, its effects go far beyond that; they tend to discourage willing probationers from cooperating. A probationer who is inclined to be

forthright is likely, when he hears a warning, to reconsider whether it is not more advantageous to be silent, evasive, or deceptive. For these reasons, the warning requirement would undermine the probation system by impairing, and perhaps frustrating, the probation officer's important inquiries into possible criminal activity by the probationer.

Nor is it acceptable to require the government to forgo the use of powerful evidence of a probationer's guilt. Such a course interferes not only with the enforcement of the criminal law but with the objectives of probation; if a probationer has committed another crime, another prosecution may be necessary in order to impose the correct punitive or rehabilitative treatment on him.[19]

In sum, we do not believe that respondent was in any sense compelled to make incriminating statements to Widseth. But even if the Minnesota Supreme Court was correct in concluding otherwise, the compulsion was limited in degree and was a necessary incident of the probation system. As part of its rehabilitative efforts for persons convicted of a crime, the State was constitutionally permitted to subject respondent to that system without forgoing the right to use his statements in a criminal prosecution.[20]

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[19] For this reason, it is not sufficient that—as the Minnesota Supreme Court apparently acknowledged (Pet. App. A7-A8), and as seems clear—respondent's statements could have been used in a probation revocation proceeding. Compare *Gagnon*, 411 U.S. at 782, with *United States* v. *Ward*, 448 U.S. 242 (1980). See, *e.g.*, *United States* v. *Johnson*, 455 F.2d 932 (5th Cir.), cert. denied, 409 U.S. 856 (1972).

[20] In addition, respondent was not required to accept probation; he did so voluntarily, as an alternative to a term of imprisonment that the State also had the power to impose. When respondent accepted probation, he was expressly advised of its conditions, and he certainly should have anticipated that his probation officer would question him if she received information suggesting that he had committed another crime. He also had no basis for believing that his answers to those questions would not be disclosed to law enforcement authorities (see page 9 note 2, *supra*).

CONCLUSION

The judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted.

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